United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1064

Case No. 1085: PALUKU **Against: The Secretary-General of the United Nations**

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha Echols; Mr. Spyridon Flogaitis;

Whereas at the request of Mr. Walambaya Tsongo Paluku, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 August 1998 and periodically thereafter until 31 July 1999;

Whereas, on 11 June 1999, the Applicant filed an Application containing pleas which read, in part, as follows:

"In case of reinstatement

1. To reinstate me ...;
2. To pay me the salary, allowances and all other benefits due to me, after deduction of the allowances which were paid to me ...;
3. To pay me the amount of US$ 3,000 for legal costs.

In case of non-reinstatement

1. To pay me the salary, allowances and all other related benefits ... after deduction of the allowances which were paid to me ...;
2. To pay me US$ 300,000 in damages ...
3. To make the outstanding payments in relation to my separation ...
4. To pay me the amount of US$ 3,000 for legal costs.

...

The Tribunal is requested to order UNICEF to pay me special post allowance [(SPA)] for having deputized for the Chief of Administration and Finance for the period from 1 August 1990 to 30 June 1991."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 December 1999 and periodically thereafter until 31 October 2001;

Whereas the Respondent filed his Answer on 31 October 2001;

Whereas the Applicant filed Written Observations on 22 March 2002;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF in Kinshasa, Zaire, on 25 February 1985, as a locally-recruited Assistant Administrative and Finance Officer on a short-term contract at the NO-B level. After completing a series of fixed-term contracts, the Applicant served one year on a probationary contract from 1 January until 31 December 1990, and was granted a permanent appointment on 1 January 1991.

From 1 August 1990 until his separation from service on 30 June 1991, the Applicant acted as Officer-in-Charge of the Finance and Administration Section of the Kinshasa Office. In late 1990, an audit was performed of the Kinshasa Office: in the resulting report, the Applicant was stated to have "committed acts of mismanagement" and to have been "caught in fraudulent activities; discovered during the audit". The report recommended that the Applicant be immediately suspended without pay; that the Representative, UNICEF, Kinshasa, (the Representative) convene an ad hoc Joint Disciplinary Committee (JDC) to investigate; and, that the Comptroller be advised accordingly. In addition, as the Applicant was stated to "ostensibly [lack] the necessary training/knowledge to manage the section" and was "seemingly experiencing

difficulties [coping] with the exigencies of the job", the report recommended that the post be converted to that of an International Project Officer.

On 20 February 1991, the Budget Programme Review Committee approved the abolition of the post occupied by the Applicant and the creation of the L-3 level international professional post of Administrative and Finance Officer. On 16 March 1991, the Division of Personnel informed the Representative that the Applicant had been confronted with his "acts of serious negligence" but that "he understood that his post [would] be abolished sometime by mid-1991 and, therefore, the question of disciplinary action against him became moot". On 30 June 1991, the Applicant was separated from service with a termination indemnity of five months salary.

On 2 April 1992, the Applicant requested the payment of an SPA for the period in which he acted as Officer-in-Charge of the Finance and Administration Section. On 8 October 1992, the Applicant reiterated this request and asked for administrative review of the decision to separate him from service, alleging "procedural irregularities".

On 15 April 1992, the Kinshasa Office advised UNICEF that following the looting of their Office and the loss of several files, the Applicant's file had been reconstituted but that there was no correspondence related to his separation.

On 1 June 1993, the Deputy Director, Human Resource Administration, informed the Applicant that his request for review was time-barred and that UNICEF did not consider there to have been any procedural irregularities in the manner in which his case was handled. The Deputy Director added that the Applicant had been "cited by the auditors ... of having allegedly committed serious irregularities" and that, "[h]ad [he] not been separated, [UNICEF] would have had to institute disciplinary measures against [him] for alleged fraudulent activities".

On 19 November 1993, the Applicant again requested administrative review. In addition, he claimed that, as the holder of a permanent contract, he was entitled to a termination indemnity of six months pay. On 30 June 1994, the Applicant provided a signed letter of appointment as evidence of his permanent contract, as a result of which UNICEF subsequently paid him the additional month of termination indemnity.

On 30 May 1996, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 23 January 1998. Its considerations, conclusions and recommendations read, in part, as follows:

"*Considerations*

10. The Panel was troubled from the outset in its consideration of this case by the lack of *terra firma*. Most of the limited information available is second hand and/or provided by the [Applicant]. ...

11. In all this haze, two facts clearly emerged:
- [The Applicant] was accused of misconduct.
- His contract was terminated for abolition of post.

12. ... In this case, the exercise of [the Respondent's] power [to employ administrative action rather than disciplinary procedures] deprived [the Applicant] of the right to defend himself.

Conclusions and Recommendations

13. The Panel concludes that the circumstances of this case justify its decision to receive and consider it.

14. It further concludes that [the Applicant] was deprived of a fundamental right to due process, and recommends that he be paid compensation in the amount of $5,000.

15. The Panel makes no other recommendation with respect to this appeal."

On 18 February 1998, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that, "[i]n the light of the specific circumstances of your case", the Secretary-General had decided to accept the JAB's unanimous recommendation regarding compensation.

On 11 June 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The post occupied by the Applicant was never abolished.

2. The termination of the Applicant's contract was illegal and, in particular, violated the provisions of staff rule 109.3.

3. The denial of an SPA was contrary to staff rule 103.11 as well as the relevant provisions of the UNICEF Personnel Administration Manual.

Whereas the Respondent's principal contentions are:

1. The Applicant's appointment was terminated due to abolition of post. The decision did not amount to a "détournement de procedure" as it was in line with the recommendation of the audit conducted at the Kinshasa Office. The decision was not a veiled disciplinary measure.

2. The Applicant has been adequately compensated for irregularities, if any, in his case.

3. The payment of a special post allowance is discretionary.

The Tribunal, having deliberated from 11 to 26 July 2002, now pronounces the following Judgement:

I. The core issue in this case is the abolition of the Applicant's post. The Applicant maintains that such abolition was fictitious; that, in fact, an identical post was simultaneously created and that the Administration erred in separating him from service due to abolition of post. Moreover, he contends that this was another instance in which the Administration substituted an administrative sanction for disciplinary proceedings, thus obtaining the Applicant's separation from service without having to safeguard any of the guarantees that a disciplinary procedure would have granted him, such as the right of defending himself against charges made.

II. The Tribunal notes that this case is complicated by the fact that the Applicant's official status file is incomplete. Of particular concern to the Tribunal is that the nature of the Applicant's appointment is disputed by the parties. The Applicant has presented a certified true copy of a letter of appointment, duly signed by both the Director General, *ad interim*, and the Applicant, in which he is granted a permanent appointment as of 1 January 1991. While the Tribunal has considered the photocopied personnel action forms annexed by the Respondent, which state that the Applicant held an extended probationary appointment, it finds that the Respondent has not overcome the *prima facie* evidence presented by the Applicant. Further, it notes that the Respondent himself accepted this letter of appointment as proof of the Applicant's permanent appointment when it paid the additional termination indemnity in February 1995.

Accordingly, for the purposes of these proceedings, the Tribunal considers the Applicant to have held a permanent contract with the Organization.

III. The Tribunal finds that, in effect, the Organization employed administrative action as a disguised disciplinary proceeding. Following an audit of the Kinshasa Office, the auditor's report stated that the Applicant had "committed acts of mismanagement" and had been "caught in fraudulent activities; discovered during the audit". The auditor recommended that an ad hoc JDC be convened and that the post occupied by the Applicant be converted to that of an International Project Officer. The Administration did not convene a JDC, but informed the Applicant that his post was to be abolished and that he would be separated from service accordingly.

The Tribunal has reviewed the available paperwork and considers that the Applicant's performance was apparently poor. The negative remarks contained in the audit report concerning his lack of training, qualifications and management ability reinforce the unsatisfactory impression existing with regard to the Applicant's performance. Albeit that the abolition of the national post encumbered by the Applicant in order to create an international post, which would be filled by a higher-level staff member, is not – and should not be – a legitimate method of terminating staff members, the Tribunal recognizes that the Administration may have felt somewhat justified in seeking a simple solution to a problematic situation.

Nonetheless, even were the Tribunal to accept that this was a straightforward case of abolition of post, in such instances the Administration must undertake good faith efforts to place the staff member in question in an alternative post. (See Judgements No. 459, *Moore-Woodroffe* (1989) and No. 501, *Lavalle* (1990).) In the instant case, the Administration made no such efforts. This reinforces the impression that the abolition of the Applicant's post was an administrative gambit designed to get rid of an inconvenient staff member without going through the motions appropriate either to abolition of post or to disciplinary proceedings.

IV. In Judgement No. 610, *Ortega et al* (1993), the Tribunal held that administrative action, rather than disciplinary proceedings, should only be employed when it neither prejudices nor damages the position of the staff member. In the instant case, the Tribunal finds that the Applicant *was* prejudiced by the use of administrative action. Disciplinary proceedings against the Applicant were necessitated by the allegations of misconduct contained in the audit report, a

finding which is further justified by the remarks of the Deputy Director, Human Resource Administration, who, on 1 June 1993, informed the Applicant that as he had been "cited by the auditors ... of having allegedly committed serious irregularities ... [h]ad [he] not been separated, [UNICEF] would have had to institute disciplinary measures against [him] for alleged fraudulent activities". In this regard, the Tribunal recalls its findings in Judgement No. 877, *Abdulhadi* (1998):

> "considering the serious implications of the 'strong suspicion' voiced against the Applicant, as well as the Auditors' recommendation, the Respondent should not have terminated the Applicant without first holding disciplinary proceedings. Not only would such proceedings have been an appropriate forum to resolve the multiplicity of issues which had been raised in the Audit Report; such proceedings also would have had the added benefit of providing necessary due process to the Applicant."

The Tribunal finds that the failure of the Organization to initiate disciplinary proceedings violated the Applicant's rights of due process. It notes that the JAB recommended compensation of $5000, which amount was paid by the Respondent. The Tribunal finds that, while this is not a case in which an order of reinstatement is justified, the Applicant is entitled to additional compensation.

V. The Tribunal notes the Applicant's contention that he was entitled to receive an SPA for the period between 1 August 1990 and 30 June 1991, during which he acted as Officer-in-Charge of the Finance and Administration Section of the Office. Staff regulation 103.11 (b) provides that a staff member given all the responsibilities and obligations of a post higher than his or her own may, in exceptional circumstances, receive an SPA. The granting of such an SPA is far from being a right of the staff member; on the contrary, the text of the regulation leaves no doubt that it is within the discretion of the Administration. Furthermore, as the Tribunal recognized in Judgement No. 336, *Maqueda Sánchez* (1984), "[s]taff employed by the United Nations are often asked to render services of a character and at a level superior to those for which they have been appointed or employed". Accordingly, this plea is rejected.

VI. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant additional compensation of $5000; and,

2. Rejects all other pleas.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha ECHOLS
Member

Spyridon FLOGAITIS
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary